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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SIDNEY DICKSTEIN
1411 K Street, N.W.
Washington 5, D. C.
Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

James Oliver, Della Oliver, Ambrose Lee, Hola Tso, Jack Clark, Kee Todacheene, Dudley Yazzie and Danny Yellowhair petitioners herein, pray that a writ of

certiorari issued to the United States Court of Appeals for the District of Columbia to review the judgment of that court entered July 26, 1962 which affirmed the action of the district court granting respondent's motion for summary judgment and dismissing petitioners' complaint.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 306 F. 2d 819 and is set out in Appendix A, *infra*, at pages 1a-7a. The district court did not write or deliver an opinion.

JURISDICTION

The judgment of the court below was entered on July 26, 1962. On October 22, 1962 Chief Justice Warren granted an extension of time to file this petition to and including November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Does "approval" by the Secretary of the Interior of an ordinance adopted by the Navajo Tribe of Indians curtailing the freedom to worship of tribal members constitute "federal action" subject to the proscriptions of the First Amendment?

2. Is the Secretary of the Interior exempted in this case from ordinary limitations upon the powers of Government officials because the guarantees of religious liberty set forth in the United States Constitution do not apply to the acts of domestic Indian tribes?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *.

STATUTES:

Revised Statute § 463, 25 U.S.C. § 2:

> *Duties of Commissioner.* The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.

REGULATIONS:

25 CFR § 11.1(e):

> Nothing in this section shall prevent the adoption, by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

25 CFR § 11.87 NH:

> Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean know(n) as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed $100.00 or both.

STATEMENT OF THE CASE

Petitioners are Navajo Indians, citizens of the United States, and members of the Native American Church, a religious organization which fosters and promotes a belief in God, adherence to moral principles and a spirit of self-respect and brotherly love among Indian Tribes throughout the United States and Canada (J.A.[1] 4-5, 24). Although many Navajos are members of the Native American Church, they constitute a religious minority of the Navajo Tribe. Prior to 1940, the Navajo members of the Native American Church were permitted to practice their religion free of federal and tribal restraints. Among thes religious practices was the use of peyote as an indispensable part of their prayer and ritual (J.A. 5, 24).

In 1935, the Secretary of the Interior promulgated a model code for the maintenance of law and order on Indian reservations within the United States, 25 CFR § 161, *et seq.*, now codified as 25 CFR § 11, *et seq.* Two years later, the Navajo Tribe adopted a law and order code directly patterned after the existing federal model and submitted it to the Secretary for adoption as a regulation of the Department of Interior. The proposed regulation was approved by the Secretary on June 2, 1937.

On June 3, 1940, the Navajo Tribal Council adopted Resolution No. CJ-1-40 requesting the Secretary to amend the law and order code by the addition of a new offense, to wit: the sale, use or possession on the Navajo Reservation of a substance known as "peyote", part of a small cactus identified botanically as lophop-

[1] The letters "J.A." refer to the appendix as printed for the use of the court below.

hora williamsii and used for sacramental purposes in the ceremonies of the Native American Church (J.A. 19, 24-25, 29). The Council resolution was not self-operative, but required the approval of the Secretary of the Interior before becoming effective (J.A. 11-12). Thereafter, the Commissioner of Indian Affairs recommended that the Secretary approve the ordinance because "the authority of the Navajo Tribal Council * * * should be respected." He emphasized however that "(1) peyote is not a habit-forming or deleterious drug, and (2) its ceremonial use is, in the minds of the members of the cult, truly a religious one" (J.A. 13). On December 18, 1940, the Acting Secretary approved the Tribe's request, and the anti-peyote penal ordinance went into effect as an amendment to the departmental regulation (25 CFR § 11.87 NH).

On January 6, 1959, the Navajo Tribal Council, acting pursuant to 25 CFR § 11.1(e),[2] adopted the law and order code of the Department of the Interior, with amendments, as tribal law (J.A. 26, 29). This resolution was also subject to approval by the Secretary of the Interior. On February 11, 1959, the Commissioner of Indian Affairs, as the Secretary's duly authorized delegate, approved the resolution "subject to the condition that if the Commissioner * * * should subsequently find that the law and order program at the Navajo Agency is not being administered to the best interests and welfare of the Navajo people, the Commissioner reserves the right to revoke his approval

[2] 25 CFR § 11.1(e) provides: "Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling . . ."

* * *" (J.A. 26, 29, R. 36). Such approval has never been revoked and the anti-peyote penal ordinance has been in continuous full force and effect on the Navajo Reservation since December 18, 1940, and has been, and is being, vigorously enforced by the Navajo police and courts. As a consequence, petitioners and other Indians who subscribe to the tenets of the Native American Church have been unable to use peyote in their religious ceremonies on the Navajo Reservation except upon pain of arrest, fines and imprisonment (J.A. 8, 26).

REASONS FOR GRANTING THE WRIT

The court below has decided an important question of federal law which has not been, but should be, settled by this Court. While the immediate impact of the decision below is directed against the religious freedom of 33,000 Navajos who are members of the Native American Church, it will also inhibit proselytizing and may encourage other Indian tribes to seek approval of penal ordinances designed to prevent acceptance of a form of religion not in keeping with those tribes' traditions and concepts of religious orthodoxy. The impact of the decision below requires review by this Court particularly where, as here, the Secretary of the Interior is prohibited by the First Amendment from approving a tribal resolution which prefers one religion over another. *United States* v. *Ballard*, 322 U.S. 78; *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642.

The decision below has an even more far-reaching effect. The court below, while acknowledging federal participation, stated that "the Secretary has done no more than approve action which the Navajo Tribe

was entitled to take."[3] It thereby relieved federal officers and agencies exercising control over non-federal organizations from constitutional and statutory prohibitions whenever such prohibitions are not directly operative upon the controlled organization. The court said: "It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal intervention in the internal affairs of an Indian tribe which the law clearly requires." (*Infra*, App. A, p. 6a). However, when a tribal resolution is adopted pursuant to federal regulation; when it cannot be implemented without federal approval; when federal approval is granted subject to a continuing power of revocation, this can hardly be federal "abstinence." *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225, 232. Had Congress never authorized the Secretary to "have the management of all Indian Affairs" (Rev. Stat. § 463, 25 U.S.C. § 2) and had the Secretary not exercised his managerial powers by arrogating to himself the right to approve or disapprove tribal penal ordinances, the "Questions Presented" would not arise. But when the Secretary exercises these powers he must do so within the limits of the Constitution. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462-463.

The court below misapplied this Court's comment in *Williams* v. *Lee*, 358 U.S. 217, 223:

> "The cases in this court have consistently guarded the authority of Indian Governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it." (App. A, *infra*, p. 6a).

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[3] App. A, *infra*, at p. 5a.

The instant case does not turn upon the propriety of the Secretary's controls over tribal action. Here it is undisputed that he imposed control, the tribe acceeded to the imposition of such control, and the Secretary exercised such control. No federal official can excuse his violation of the Constitution by suggesting that the result would have been the same even if he had abstained from violating it.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
1411 K Street, N.W.
Washington 5, D. C.
Attorney for Petitioners